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Vice President
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CENDANT

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

HAND DELIVERED

May 5, 2003

Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, D.C. 20554

Re: Telephone Consumer Protection Act-
Further Notice of Proposed Rulemaking
FCC –CG Docket02-278, FCC 03-62

Dear Mr. Secretary:

Enclosed are six copies of comments submitted by Cendant Corporation in the above referenced rulemaking.

Sincerely,

Kimberly Hunter-Turner

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May 5, 2003

Before the
Federal Communications Commission

Telemarketing Rulemaking – Further Notice of Proposed Rulemaking Comment

FCC Docket No. 03-62

Comments of

Cendant Corporation

Cendant Corporation ("Cendant") appreciates the opportunity to submit additional comments on the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, as the Commission considers proposed amendments to that Rule.

CENDANT OVERVIEW

Cendant Corporation is a diversified global provider of business and consumer services within the hospitality, real estate, vehicle, financial and travel sectors.

Cendant's hospitality division is the world's leading franchisor of hotels through ownership of brand names that include Ramada®, Days Inn®, Howard Johnson®, Travelodge®, Knights Inn®, Super 8 Motel®, Wingate Inn®, Villager Lodge/Premier® and AmeriHost®, a leading operator of branded time share resorts (Fairfield®) and Trendwest® and the world's leading time share exchange service (RCI®).

Cendant is also the leader in franchised residential real estate brokerage operations through its CENTURY 21®, Coldwell Banker® and ERA® brands, a leading residential mortgage company (Cendant Mortgage) and provider of employee relocation services (Cendant Mobility).

In vehicle services, Cendant owns AVIS® and Budget® car rental systems. Other Cendant subsidiaries provide vehicle fleet management services (PHH Arval and Wright Express).

Cendant's financial services division helps financial institutions enhance existing consumer products. This division includes Progeny Marketing Innovations Inc. (Progeny). Progeny creates and offers insurance and loyalty marketing programs to financial institutions. The division also includes Jackson Hewitt Inc., the second largest tax preparation franchisor.

Cendant provides services to the travel industry through its Galileo®, Wizcom reservations global travel ticket distribution services as well as its on-line (Trip.com and Cheaptickets.com) and off-line (Cendant and Cheap Tickets) travel agencies.

I. THE FCC LACKS JURISDICTION OVER THE BUSINESS OF INSURANCE

The FCC seeks comment on whether it should use its authority under the Telephone Consumer Protection Act of 1991, 47 C.F.R. Part 64 (TCPA) to extend the national do-not-call registry adopted by the Federal Trade Commission (FTC) to those entities that fall outside the FTC's jurisdiction, such as banks and insurance companies.[1] The FCC's proposal assumes that the TCPA applies to all entities, including insurance companies, that are exempt from the FTC's jurisdiction.

The FCC's proposed amendments are inconsistent with the McCarran-Ferguson Act which provides that "[n]o act of Congress shall be construed to invalidate, impair or supersede" a state law which was enacted for the purpose of regulating the business of insurance unless such act specifically relates to the business of insurance.[2] The TCPA itself makes no reference to "the business of insurance." However, the legislative history of the TCPA makes several references to its applicability to persons engaged in the business of insurance. The report of the Senate Commerce, Science and Transportation Committee on the Senate version of the bill that became the TCPA provides as follows:

> The FCC also should consider the case of group contracts with affinity groups. For instance, if the governing board of an organization signs an agreement with a life insurance company to offer discounted life insurance policies to the members of the organizations, the members of the organization may be considered to have given their "implied" consent to be called by this life insurance company.[3]

[1] 67 *Fed. Reg.* at 62676.
[2] 15 U.S.C. § 1012(b).
[3] S. Rep. No. 102-177 at 5 (October 8, 1991).

The House Energy and Commerce Committee Report on the House bill stated the following:

> A loan officer or financial consultant may call a telephone subscriber who had requested a loan or bought auto insurance a couple of months ago to pitch new loan offerings or other types of <u>insurance</u>.
>
> *   *   *
>
> The restriction on calls to emergency lines, pagers and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers. For example, a retailer, <u>insurer</u>, banker or other creditor would not be prohibited from using an automatic dialer or recorded message player to advise a customer (at a telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid.[4] (Emphasis added)

While the legislative history of the TCPA does refer to insurance, in each case it was to clearly state that it was not Congress' intent to have TCPA in anyway impair or restrict the use of telephones to market or sell insurance. This legislative history does not in, anyway override the clear language of the McCarran-Ferguson Act, which prohibits an act of Congress from invalidating, impairing or superseding any state law that was enacted for the purpose of regulating the business of insurance unless the federal act specifically relates to the business of insurance. Thus, the FCC lacks jurisdiction to impose the TCPA and any rule proposed thereunder on the sale of insurance.

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[4] H.R. Rep. No. 102-317 at 15, 17 (November 15, 1991).

II. ADDITIONAL RESTRICTIONS IMPOSED ON CURRENT BILLING PRACTICES ARE UNNECESSARY.

a. There Are Sufficient State Controls In Place That Regulate The Business of Insurance

A new regulatory scheme is unnecessary, since the marketing of insurance products is already heavily regulated by the states. Firms are subject to numerous state laws and regulations concerning the business of insurance. Each state has a designated insurance commissioner or official who is a member of the National Association of Insurance Commissioners (NAIC). The NAIC provides a forum for the development of uniform insurance policy. They balance the concerns enunciated by consumer groups with industry's business interests. The NAIC drafts model laws that states then adopt legislatively or through administrative rulemaking. The NAIC models generally serve as the basis for state insurance legislation and regulations. States are able to and often do enact laws and regulations that are more stringent.

The NAIC Model Acts that have been adopted in virtually all regulatory jurisdictions and are most applicable in terms of Progeny's marketing of insurance are the following:

Advertisements of Accident and Sickness Act
Unfair Trade Practices Act and
Producer Licensing Model Act [5]

The NAIC Model Law for Advertisements of Accident and Sickness Insurance applies to all advertisements, whether print, broadcast, electronic, or by prepared sales talk. A telemarketing call is conducted via a script and would therefore be considered a prepared sales talk. This model law contains numerous consumer protection safeguards aimed to protect the insurance buying public through the advertising media and materials used by insurance agents and companies. The model law covers issues from required clear and truthful disclosures, form and content of the advertisements, marketing standards, and licensing matters.

The NAIC Model Law governing Unfair Trade Practices also provides ample consumer protections that apply to telemarketing calls. The model is drafted in very broad terms, generally prohibiting any advertising statements that are untrue, deceptive,

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[5] Advertisements of Accident and Sickness (N.A.I.C. 40-1) Model Laws, Regulations and Guidelines, January 2003; Unfair Trade Practices Act (N.A.I.C. 880-1) and Producer Licensing Model Act (N.A.I.C. 218-1).

or misleading which prohibits "[m]aking, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any insurer in the conduct of its insurance business."

Finally, the NAIC Model Law governing Producer Licensing also serves to protect the public. Progeny, a Cendant subsidiary and a licensed third party administrator uses licensed insurance agents, as applicable, for all of its telemarketing calls to market, solicit and sell its insurance products. Any agent that uses deceptive, misleading, or fraudulent sales practices would be subject to state disciplinary action against his or her license, including suspension or revocation of the license and/or civil penalties.

These provisions individually and collectively address possible harm caused by abusive telemarketing practices in the insurance industry. Moreover, the scope of the provisions extend beyond the context of pre-acquired account telemarketing and address any instance where a seller of insurance products causes a charge to be submitted for payment and guards against misrepresentations and receiving of account information from any person other than the consumer.

We urge the Commission not to impose new billing practice regulations on the insurance industry. Existing state laws dispositively address the risks of telemarketing fraud in the insurance industry. Additional duplicative regulation will not improve these controls; it will unduly burden the industry without conferring additional consumer protections.

III. NATIONAL DO-NOT-CALL LIST

a. There Needs To Be a Single Do-Not-Call List

Should the FCC determine that it has jurisdiction over the business of insurance, Cendant supports the creation of a single national do-not-call list. A single national list is a step forward for consumers, some of whom do not wish to receive telemarketing calls at home, and for businesses that do not want to incur the expense of calling consumers who do not wish to receive calls. Numerous states have enacted their own do-not-call list requirements. While not citing the total number of consumers who have chosen to add their names to state do-not-call lists, the Federal Trade Commission in their Notice of Proposed Rulemaking (FTC Telemarketing Rulemaking File No. R411001, April19,

2002) notes that four million consumers have signed up for the Direct Marketing Association's Telephone Preference Service and suggests that the number of consumers signing up for state do-not-call lists is growing dramatically. The FCC should coordinate with the FTC to create one national list. A single national list would protect those consumers who are not currently protected by, incorporating those consumers that fall under FCC's jurisdiction. If a separate FCC list is created, companies will be faced with having to develop compliance mechanisms for the FCC list as well as the FTC list and a list for every state into which they call. For companies, like Cendant, that operate nationally, this alone could create significant compliance burdens. We are concerned that different and, potentially conflicting, definitions and standards between federal and state lists will develop.

A multitude of lists will also complicate the situation from the consumers' perspective. Consumers will be unsure whether, having signed up for the FCC or FTC list, they also need to sign up for the list in the state in which they live. Some of the effectiveness of two national do-not-call lists will be lost if multiple, parallel systems continue to operate.

We encourage the FCC to take steps to minimize the burden of complying with numerous, potentially conflicting obligations. Along these lines, we urge the FCC to incorporate names already found on any existing state lists established by state legislation/regulation into one national list. This would, in effect, incorporate all the state lists into a national list. It would significantly improve the ability of merchants desiring to comply. We also recommend that the FCC report to Congress that preemption of state laws would actually make it simpler and easier for consumers to exercise their preferences and for businesses to respect those choices. While preemption of only weaker state laws may be appealing to some, it would not address the compliance burden on business. The greatest prospect for success of the system proposed by the FCC is to create one clear set of standards for everyone to follow.

Thank you for your consideration of our views on the three topics that we have addressed in our comments.

Respectfully submitted,

Kimberly A. Hunter Turner

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